IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. JOHNNY DIAZ, Respondent.	Case No. SC01-2779

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S REPLY BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Senior Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 238538

SUSAN D. DUNLEVY
Assistant Attorney General
Florida Bar No. 229032
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2367
(813)801-0600
Fax (813)873-4771

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

SUMMARY OF THE ARGUMENT

The Second District correctly concluded that its decision below is in conflict with *State v. Wikso*, 738 So. 2d 390 (Fla. 4th DCA 1999), and *State v. Bass*, 609 So. 2d 151 (Fla. 5th DCA 1992). Accordingly, this Court has jurisdiction to hear this case and resolve the conflict.

Because Respondent's temporary tag was not clearly visible, the traffic stop of Respondent's vehicle was valid, and the deputy had the right to ask Respondent for his license and registration. Accordingly, the trial court correctly denied Respondent's motion to suppress the evidence against him, and the Second District Court of Appeal erred in reversing the judgment and sentence in this case.

ARGUMENT

THE JUSTIFICATION FOR THE STOP OF RESPONDENT'S CAR WAS VALID AND CONTINUED AFTER THE DEPUTY GOT CLOSE ENOUGH TO READ THE THERETOFORE UNREADABLE TEMPORARY TAG.

JURISDICTION

Respondent initially argues that this Court does not have jurisdiction because there is no conflict between the Second District's opinion in *Diaz v. State*, 800 So. 2d 326 (Fla. 2d DCA 2001), and the Fourth District's opinion in *State v. Wikso*, 738 So. 2d 390 (Fla. 4th DCA 1999), or the Fifth District's opinion in *State v. Bass*, 609 So. 2d 151 (Fla. 5th DCA 1992). However, Respondent's jurisdictional argument is without merit, and the

Second District properly certified conflict with these two cases.

Respondent strains to factually distinguish *Wikso* based on the fact that the trial court in that case relied solely on the probable cause affidavit to establish the facts upon which it based its ruling and the contention, which is unsupported by the *Wikso* opinion, that, although the defense maintained that the officer was able to read the tag as he approached the vehicle, "Since the evidence of the probable cause affidavit did not support this defense factual assertion, the district court did not consider it in ruling" (Respondent's answer brief on the merits at p. 6). The *Wikso* opinion says no such thing! Rather, that opinion indicates that, if the stop was valid based on the officer's observation of an apparent traffic violation that led to initiation of the stop, the officer has a right to ask to see the driver's license and vehicle registration and even to require the driver to exit the car, implying that the fact that the officer is able to ascertain upon close approach of the stopped vehicle before actually making contact with the driver that there was, in fact, no traffic violation does not vitiate the aforementioned rights.[1]

---

[1] *Wikso*'s entire legal discussion of the issue before it reads as follows:

> The State argues that the initial stop of the defendant's vehicle was proper because

the officer was unable to read the tag when he effected the stop. Because the initial stop was proper, the state argues, the officer was justified in requesting that defendant exit the vehicle. Once defendant opened the door and revealed the contraband to plain view, the resulting seizure of the contraband and arrest were proper.

Defendant concedes that the facts disclose that the officer was initially unable to read the tag. Yet he maintains that when the tag became legible as the officer approached the stopped vehicle, the encounter should have been terminated. In *Stanley v. State*, 559 So. 2d 460, 461 (Fla. 4th DCA 1990), we held that:

> Once a motor vehicle has been lawfully detained for a traffic violation, the police officer may order the driver to exit the vehicle without violating the fourth amendment's proscription of unreasonable searches and seizures. *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977). This is a reasonable part of police procedure balancing the safety of the officer against the intrusion into the driver's personal liberty. Furthermore, when the police have a reasonable belief, an articulable suspicion, that the suspect poses a danger, and roadside encounters between police and suspects are especially hazardous, a protective search is justified. *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983). [c.o.]

559 So. 2d at 461. Similarly, in *State v. Bass*, 609 So. 2d 151 (Fla. 5th DCA 1992), under similar circumstances, the court held that "once the vehicle was properly stopped, the officer could ask to see the driver's license and registration." 609 So. 2d at 152.

A fair reading of *Wikso* is that the Fourth District understood the basic facts to be that the officer stopped the defendant's vehicle for "displaying an improper license tag" based on the officer's inability to read the tag before stopping the car, but that the officer was able to read the tag upon closer approach to the stopped car and before making contact with the driver, and that, on these facts, the Fourth District held that the officer had a right to ask the driver for his license and vehicle registration before terminating the stop. The Second District's holding in the instant case *is* in direct conflict with *Wikso*, as the Second District panel forthrightly recognized in certifying conflict.

As for the *Bass* case, the factual basis for the stop in *Bass*, which was that "the temporary tag on his vehicle was not sufficiently visible for the officer to determine whether it had expired," 609 So. 2d at 152, is indistinguishable from the factual basis in the case at bar, wherein the officer testified that he stopped Respondent because Respondent's temporary tag "was unreadable; the date, the expiration date was unreadable at the time" (T 5).

> Because the only "evidence" considered by the trial court entirely supported the stop, seizure and arrest in this case, the trial court erred in holding the seizure and arrest invalid.

MERITS

An otherwise valid arrest or search is not rendered illegal by the fact that it turns out that the arrestee is innocent, *McCoy v. State*, 565 So. 2d 860 (Fla. 2d DCA 1990) (defendant's arrest for possession of cocaine based on his dropping what appeared to be rock cocaine while fleeing from police in high drug area was lawful even though it later turned out that object he had dropped tested negative for cocaine). Similarly, a stop for what appears to be a traffic violation is valid even if it should later turn out that, in fact, no traffic violation had been committed. *Hilgeman v. State*, 790 So. 2d 485 (Fla. 5th DCA 2001), upon which Respondent relies, does not hold to the contrary, but rather involves innocent activity which the officer would have known was innocent when he observed it but for his incorrect understanding of the *law*, not a misapprehension of fact.

Respondent's argument that the stop was improper is not well taken. The fact that the issuer of the temporary tag does not fill it out with ink dark enough to be seen from at least a few car lengths away does not relieve the owner of any obligation he or she may have to ensure that the tag is visible and legible from a reasonable distance. The owner can insist that the issuer make the tag legible, or the owner can him- or herself go over it with a darker or thicker marker so as to make it

legible.

Again, even assuming that, as the Fifth District held in *Sands v. State*, 753 So. 2d 630 (Fla. 5th DCA), *review denied*, 773 So. 2d 56 (Fla. 2000), *cert. denied*, ___ U.S. ___, 121 S. Ct. 1155, 148 L. Ed. 2d 1016 (2001), Section 316.605(1) is not applicable to temporary tags, a license tag is not clearly visible if it cannot be read unless the observer is standing at the rear bumper of the vehicle. Thus, Respondent's vehicle was in violation of Section 320.131(4) and was therefore properly stopped.

It is not logical for this state to issue temporary license tags for a limited period of time if it cannot enforce the requirement that a vehicle using a temporary tag must use a temporary tag that is not expired, § 320.131(3), and this requirement cannot be enforced if a vehicle bearing an illegible tag cannot be stopped to determine whether or not the tag is expired or is otherwise illegal. If Section 320.131 is so interpreted, anyone and everyone could avoid all tag requirements and identification of their vehicle via the license tag by obtaining and displaying a temporary tag, thus rendering their vehicle immune to being stopped for any problem connected with the tag.

As to Respondent's further argument, Petitioner would rely on its initial brief on the merits.

CONCLUSION

Petitioner respectfully requests that this Honorable Court quash the opinion of the Second District Court of Appeal and remand this case with instructions to reinstate Respondent's adjudication of guilt and placement on probation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Carol J.Y. Wilson, Assistant Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33831-9000, this 15th day of February, 2002.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Senior Assistant Attorney General

Chief of Criminal Law, Tampa
Florida Bar No. 238538

SUSAN D. DUNLEVY
Assistant Attorney General
Florida Bar No. 229032
2002 N. Lois Ave. Suite 700
Tampa, Florida 33607-2367
(813)801-0600
Fax (813)873-4771

COUNSEL FOR PETITIONER